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AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Part 752

RIN 0412-AA81

Requirement for Nondiscrimination against End-Users of Supplies or Services ("Beneficiaries") under USAID-Funded Contracts

AGENCY: U.S. Agency for International Development.

ACTION: Proposed Rule.

SUMMARY: The Foreign Assistance Act of 1961, as amended (FAA), authorizes the U.S. Agency for International Development (USAID) to provide foreign assistance in the form of development and humanitarian assistance that reflect American ideals. To help emphasize USAID's intent and expectation of non-discrimination of beneficiaries in USAID-funded activities, USAID is proposing to amend its Agency for International Development Acquisition Regulation (AIDAR) to include a new clause entitled "Nondiscrimination against End-Users of Supplies or Services." This proposed clause expressly states that USAID-funded contractors must not discriminate among end-users of supplies or services (referred to in this rule as beneficiaries and potential beneficiaries) in any way that is contrary to the scope of the activity as defined in the statements of work (SOWs).

DATES: To be considered, comments must be received no later than [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Address all comments concerning this notice to Todd Larson, Senior Coordinator, U.S. Agency for International Development, Rm. 6.09-71 RRB, 1300 Pennsylvania Avenue, NW, Washington, DC 20523. Submit comments, identified by title of the action and Regulatory Information Number (RIN) by any of the following methods:

1. Through the Federal eRulemaking Portal at <http://www.regulations.gov> by following the instructions for submitting comments.

2. By E-mail: Submit electronic comments to [tlarson@usaid.gov](mailto:tlarson@usaid.gov). See SUPPLEMENTAL INFORMATION for file formats and other information about electronic filing.

3. By Mail addressed to: Todd Larson, U.S. Agency for International Development, Rm. 6.09-71 RRB, 1300 Pennsylvania Avenue, NW, Washington, DC 20523

FOR FURTHER INFORMATION CONTACT: Todd Larson Telephone: 202-712-4969 or E-mail: [tlarson@usaid.gov](mailto:tlarson@usaid.gov)

SUPPLEMENTARY INFORMATION:

I. Background.

USAID seeks to improve the lives of people around the world by being inclusive in its development and

humanitarian assistance efforts. In so doing, USAID recognizes that every person is instrumental in the transformation of their own societies, with the end result that each and every person is recognized and equally valued without regard to artificial and discriminatory distinctions. The inclusion, protection, and empowerment of all persons is critical because drawing on the full contributions of the entire population leads to more effective, comprehensive, and sustainable development results.

Nondiscrimination is the basic foundation of USAID's inclusive development approach; as such, all USAID programs seek to ensure access for all potential beneficiaries within the scope of the contract without discrimination. Contractors must adhere to this by implementing the activities as outlined in the contract SOWs. Nondiscrimination is a critical foundation for protecting and promoting the human rights of all persons. In addition, nondiscrimination ensures equitable access to USAID programs. Effective nondiscrimination practices support USAID's principles of inclusion and equal access and help to ensure that USAID programs empower and effectively reach women and girls; marginalized ethnic and religious populations; indigenous peoples; internally

displaced persons; persons with disabilities; youth and the elderly; lesbian, gay, bisexual, transgender, and intersex individuals; and other socially marginalized individuals and peoples unique to the country or regional context.

In recent years, the Government has made multiple pronouncements of policy in many areas reflecting its emphasis on equity, fairness, and human dignity—effective nondiscrimination is a means toward achieving all of these. For example, in 2011, the White House issued E.O. 13563, “Improving Regulation and Regulatory Review,” to update all agencies on factors to consider when issuing rules; in addition to quantitative factors, it advised that the qualitative values of equity, fairness, and human dignity are important considerations. Additionally, a 2011 Presidential Memorandum, “International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons,” directs all agencies engaged abroad to advance nondiscrimination. This proposed rule addressing discrimination in the provision of supplies or services is consistent with the values that animate the above.

## II. Discussion.

This rulemaking would revise (48 CFR) AIDAR to add a new clause at 752.7038 entitled “Nondiscrimination against

End-Users of Supplies or Services.” The clause, applicable to all solicitations, contracts, and subcontracts at any tier, prohibits contractors and subcontractors from discriminating against beneficiaries or potential beneficiaries (i.e., those individuals intended to receive the benefits of the award, whether goods or services) on the basis of any characteristics not expressly stated in the award.

This proposed rule is published for public comment pursuant to the Office of Federal Procurement Policy Act (41 U.S.C. 1707).

The Administrative Procedure Act (APA) provides an exception for “matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts” from the requirement of public notice and comment before a final rulemaking. 5 U.S.C. 553(a)(2). This rulemaking is directly related to contracts.

The Office of Federal Procurement Policy Act, 41 U.S.C. 1707, imposes a separate requirement for public comment prior to final rulemaking for any “procurement policy, regulation, procedure, or form . . . if it (A) relates to the expenditure of appropriated funds; and (B)(i) has a significant effect beyond the internal operating procedures of the agency issuing [it]; or (ii)

has a significant cost or administrative impact on contractors or offerors.” This proposed rulemaking is related to procurement policy and will amend USAID’s Acquisition Regulation (AIDAR).

Per subsection (b) of this statute, USAID is publishing this proposed rulemaking for a comment period of 30 days.

The purpose of this rulemaking is to ensure adherence to the intent and authorities in the FAA, and other statutes related to humanitarian assistance and international development. The stated intent of the FAA is to help people, without regard to irrelevant and discriminatory distinctions among them. This intent is reflected in many places in the statute. The first words of the Act set out that it seeks to promote United States interests “by assisting peoples of the world.” Congress explained its intent thusly in FAA section 101: “[T]he Congress reaffirms the traditional humanitarian ideals of the American people and renews its commitment to assist people in developing countries to eliminate hunger, poverty, illness, and ignorance.”

A survey of FAA provisions relevant to USAID awards reflects that they focus on development and humanitarian assistance needs and effectiveness toward meeting them.

For example, FAA section 103, on agriculture, rural development, and nutrition, suggests assistance should focus on alleviating poverty. FAA section 104, on health-related assistance, suggests limited targeting of activities to the specialized health needs of children, infants, and mothers. FAA section 491, on international disaster assistance, contemplates "prompt United States assistance to alleviate human suffering" and emphasizes only that the implementing agency "shall insure that the assistance provided by the United States shall, to the greatest extent possible, reach those most in need of relief and rehabilitation as a result of natural and manmade disaster."

In some contexts, such as assistance for child survival, the foreign assistance authorities contemplate a focus on women and children, but that is a matter of programmatic need and effectiveness. There is no context where excluding individuals from assistance based on any of the types of discrimination proscribed by this clause, outside the scope of the award, would have a positive effect on implementing USAID's foreign assistance authorities.

The main effect of this clause is to ensure that USAID's policy and practice of non-discrimination in

planning projects and activities is followed through to completion by the contractors that implement them. Its impact on contractors and offerors is to remind them to follow the terms and conditions of the contract, including the implementation of the SOW as designed, and to refrain from the types of discrimination described in the clause. In itself, the proposed clause serves as a reminder to contractors and offerors of USAID's long-standing, pre-existing expectations based on USAID's programmatic and planning priorities and authorities.

III. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review).

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess the costs and benefits of the intended regulation. E.O. 13563 allows that in making this assessment, an agency "may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts." The estimated costs of this rulemaking do not exceed the threshold of economic significance (i.e., an annual effect on the economy of \$100 million or more). However, the proposed rule has been designated a "significant regulatory action" under section

3(f) of Executive Order 12866 and therefore it has been reviewed by the Office of Management and Budget.

This rule provides a benefit by promoting non-discrimination, which itself promotes programmatic efficiency, with very little additional administrative burden for the affected entities, USAID contractors. It does not ask them to carry out activities beyond those in their contract SOWs and terms and conditions; it does not ask them to alter the manner in which they conduct the work as set out in their contracts. In fact, it reminds them to stay within those instructions. The only potential cost the Agency could identify for contractors and subcontractors is for minimal training, to the extent that contractors do not already proscribe discrimination as part of the normal conduct of their business.

USAID awards approximately 1,300 contracts/task orders annually. As a practical matter for these current contracts, even absent this clause, if for example a contract specified the provision of food parcels in a certain community, the contractor could not, on its own, decide that only certain members of that community should receive the food parcels or that certain members should be excluded.

Including this clause in all new contracts and subcontracts going forward provides an explicit reminder of USAID's expectation that its contractors not discriminate against any protected group or individual, and is particularly important in countries where stigma and discrimination toward certain groups is tolerated or officially endorsed by the government. The benefits of the rule would be to expressly reinforce notions of equity, fairness, and human dignity under Federal Government contracts.

Contractors responding to a solicitation (e.g. request for proposals (RFP) or invitation for bid (IFB)) would further be on notice not to include any discriminatory criteria in their response to a solicitation, absent specific programmatic justification in the SOW to do so.

#### IV. Regulatory Flexibility Act.

Congress enacted the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. 601-612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. It requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities.

In fiscal year 2015, 330 small businesses received USAID funds. In fiscal years 2011, 2012, 2013, and 2014 the 391, 384, 349, and 363 small businesses received USAID funds, respectively. The requirement this rule would impose on small businesses is no different than the requirement for other entities: Contracts or subcontracts awarded to them will include a provision reminding them not to discriminate. Beyond adding a brief reminder or discussion of this now explicit requirement to existing trainings on business ethics and conduct they provide to their staff, as already required by FAR 3.10, we do not estimate that this will impose a significant additional cost. As with all contractors, the employees of small businesses will be expected to be mindful of the principles of equity, fairness, and human dignity when performing the work under their contracts; as they have always been. The additional effort by small businesses (a matter of a few minutes of discussion) is so de minimis that we do not estimate that this will impose more than a negligible cost.

There are no reporting or recordkeeping requirements associated with this rule. The rule does not duplicate, overlap, or conflict with any other Federal rules. There is currently no other Federal rule addressing discrimination of recipients of supplies or services

pursuant to a Federal Government contract. There were no significant alternatives identified that would meet the objective of the rule.

In light of the above analysis, the USAID Chief Acquisition Officer certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.

#### V. Paperwork Reduction Act.

This rule does not include a reporting or information collection requirement. Therefore, USAID has determined that this rule does not impose any new or revised reporting or disclosure requirements that would be considered collections of information requiring Office of Management and Budget approval under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

List of Subjects in 48 CFR part 752:

Government procurement.

For the reasons discussed in the preamble, USAID amends 48 CFR Chapter 7 as set forth below:

1. The authority citation for 48 CFR Chapter 7 part 752 continues to read as follows:

Authority: Sec. 621, Pub. L. 87-195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; and 3 CFR 1979 Comp., p. 435.

SUBCHAPTER H -- CLAUSES AND FORMS

PART 752 -- SOLICITATION PROVISIONS AND CONTRACT CLAUSES

2. Add Section 752.7038 to read as follows:

§ 752.7038 Nondiscrimination against End-Users of Supplies or Services.

The following clause must be inserted in section I of all solicitations and resulting contracts.

Nondiscrimination against End-Users of Supplies or Services  
(Date)

(a) USAID policy requires that the contractor not discriminate against any end-user of the contract supplies or services (i.e. the beneficiaries of the supplies or services) in implementation of this award, such as, but not limited to, by withholding, adversely impacting, or denying equitable access to the supplies or services (benefits) provided through this contract on the basis of any factor not expressly stated in the award. This may include, for example, race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, disability, age, genetic information, marital status, parental status, political affiliation, or

veteran's status. Nothing in this clause is intended to limit the ability of a contractor to target activities toward the assistance needs of certain populations as defined in the contract.

(b) The Contractor must insert this clause, including this paragraph, in all subcontracts under this contract.

(End of clause)

Dated: August 8, 2016.

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Sunil Xavier,

Acting Chief Acquisition Officer.

[FR Doc. 2016-19716 Filed: 8/19/2016 8:45 am; Publication Date: 8/22/2016]